IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.158 OF 2005
IN
SUIT NO.1228 OF 1985

Rasilaben Kantilal Kansar. ..Plaintiff.

V/s.

Sumitra Amratlal Kocha & Ors. ..Defendants.

Mr.V.R.Dhond with N.Engineer i/b. Vijaykumar & Co. for Applicant-Defendant No.2 and 3.

Mr.M.P.S.Rao with Chirag Balsara and Ms.Dipti Walida i/b. K.Ashar & Co. for defendant No.1(A) to 1(E).

Mr.M.S.Doctor i/b B.Munim & Co. for plaintiff.

CORAM: A.M.KHANWILKAR,J

DATE : OCTOBER 17, 2005.

P.C. :

1. Heard counsel for the parties. The plaintiff and original defendant Nos.1, 2 and 3 were partners of M/s. Babubhai Narottamdas and Co. The plaintiff issued notice on 8th October, 1984 for dissolving the partnership firm. Defendant No.2 and 3 on the other hand, took the stand that the plaintiff could not have dissolved the partnership but has retired from the said firm. As this controversy was raised, plaintiff instituted suit in this court being Suit No. 1228 of 1985 for the following reliefs:

(a) that it may be declared that the said partnership firm of 'Babubhai Narottamdas & Co.,' is dissolved and stands dissolved by the said notices Exhs. 'F', 'G' and 'H' hereto with effect from or about 9th October, 1984 or with effect from such date as this Hon'ble Court may deem just and proper. In the alternative, in the event of its being held by this Hon'ble Court that the said partnership is not dissolved by the said notices Exh.'F', 'G' and 'H' hereto, the said partnership be dissolved by and under the order and directions of this Hon'ble Court;

(b) that it may be declared by this Hon'ble Court that the plaintiff is entitled to a share of 24.25 (twenty four and a quarter) percent in the business and in assets and property of the said firm as also in the profits of the said business of 'Babubhai Narottamdas & Co.';

(c) that it may be declared by this Hon'ble Court that the premises of the said flat taken on Ownership basis on the second floor of the building known as Sea-Gull Apartment situate at 24, Bhulabhai Desai Road, Bombay 400 026, (where the 1st defendant since deceased presently stays) really absolutely belongs to the said firm of 'Babubhai Narottamdas & Co.';

(d) that it may be declared by this Hon'ble court that the premises of the said flat taken on ownership basis on the sixth floor of the building known as Bharat Apartments situate at Gandhidham Road, Juhu, Bombay-400 056 (where the 3rd defendant present stays) really absolutely belongs to the said firm of 'Babubhai Narottamdas & Co.';

(e) that the defendants be ordered and decreed to render full, true and proper account by and under the orders and directions of this Hon'ble Court in respect of the partnership business of the said firm of 'Babubhai Narottamdas & Co.' for the period from 1st January, 1980 till the date of the dissolution of the said firm, that is till or about 9th October, 1984 or till such

date as this Hon'ble Court may deem fit and proper and the plaintiff's share be ascertained and paid over to her;

(f) that it may be declared that the plaintiff is entitled at her option to the share of profits or interest at six per cent per annum as mentioned in paragraph 33 hereof;

(g) that the defendants be ordered and decreed to pay to the plaintiff such amount as may be found due and payable to her on such account when taken with interest on the said amount at the rate of 18 (eighteen) percent per annum or at such rate as this Hon'ble court may deem reasonable from the date of the dissolution of the said partnership till payment;

(h) that the defendants be ordered and decreed to render full, true and proper account by and under the orders and directions of this Hon'ble Court in respect of the said business of the said firm of 'Babubhai Narottamdas & Co.' carried on by the defendants with the assets and property of the said firm of 'Babubhai Narottamdas & Co.' since or about 10th October, 1984 until the same is discontinued by them or the same otherwise ceases to be carried on by them;

(i) that the defendants be ordered and decreed to pay to the plaintiff such amount as may be found due and payable to her at the foot of such account as mentioned in prayer (e) hereof; when taken with interest on such amount at the rate of 18 (eighteen) percent per annum or at such rate as this Hon'ble Court may deem reasonable till payment;

(j) that for all or any of the purposes aforesaid, all such enquiries be held and accounts taken and directions be given as may be necessary or just;

(k) that pending the hearing and final disposal of this suit, the Court Receiver, High Court, Bombay or some other fit and proper person be appointed Receiver of the suit partnership business of 'Babubhai

Narottamdas & Co.' and of all its assets and property to include - (i) the said property known as 'Narottam Nivas' situate at 308, Tardeo Road, Nanachowk, Bombay-7, (ii) the said premises of one shop or gala admeasuring 180 (one hundred and eighty) square feet situate on the ground floor of the said property 'Narottam Nivas', (iii) the land admeasuring about 1250 (one thousand two hundred and fifty) square yards together with the factory building and a garage of R.C.C. construction standing thereon and situate at P-1 Industrial Estate, Walbhat Road, Goregaon (East), Bombay-400 063, (iv) premises of the flat taken on ownership basis on the second floor of the building known as Sea-gull Apartment situate at 24, Bhulabhai Desai Road, Bombay- 400 026, (v) premises of the flat taken on ownership basis on the sixth floor of the building known as Bharat Apartments situate at Gandhidham Road, Juhu, Bombay - 400 056, (vi) Plants and machineries specified in the list thereof being Exhibit 'C' hereto, (vii) articles of furnitures, fixtures etc., specified in the lists being Exhibits 'D' and 'E' hereto, (viii) three 'Ambassador' motor cars Nos. MRF-8480 (1970 model), MMG 129 (1980 model) and MMG-8173 (1982 model, (ix) two telephones bearing Nos. 695386 and 693048 together with about nine telephones made by Super Phone Co., for inter-communication purpose and all of them installed in the said factory building at Goregaon, (x) one telephone bearing No.363284 installed in the said premises on the first floor of the said property known as 'Narottam Nivas' and where the 2nd defendant resides, (xi) one telephone bearing No.4925412 installed in the premises of the said flat on the second floor of the said building known as 'Sea-gull Apartment', (xii) the goodwill of the said firm and its stock-in-trade, outstandings and moneys belonging to the said firm and lying in the banking accounts of the said firm with the State Bank of India, Peddar Road Branch, Bombay, Bank of Baroda, Gowalia Tank Branch, Bombay, Vijaya Bank, Gamdevi Branch, Bombay and Hongkong Bank, Commerce House, near Air-conditioned Market, Tardeo, Bombay and (xiii) all books of account, documents and papers relating to the

> business of the said firm of 'Babubhai Narottamdas & Co. for the period from 1st January, 1980 till date, with all powers under Order 40 Rule 1 of the Code of Civil Procedure;
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> (l) that pending the hearing and final disposal of this suit, by an Order and Injunction of this Hon'ble Court the defendants by themselves, and by their respective agents and servants be restrained from in any manner whatsoever alineating, encumbering, selling, transferring or otherwise disposing off or parting or dealing with the said business and assets of 'Babubhai Narottamdas & co.' to or in favour of any third party or from inducing any third party in the said property 'Narottam Nivas' situate at 308, Tardeo Road, Nana Chowk, Bombay 400 007 or any part thereof and/or in the said property situate at P-1 Industrial Estate, Walbhat Road, Goregaon (East), Bombay 400 063, or any part thereof or in the said two flats or any of them or any part thereof;
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> (m) that interim and ad-interim reliefs in terms of abovementioned prayers (k) and (l) be granted to the plaintiff;
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> (o) that the plaintiff may have such further and other reliefs as this Hon'ble Court may in the nature and circumstances of the case deem fit, necessary and proper."

2. During the pendency of the said suit, interim applications were taken out, which proceeding was taken up to the Apex Court. The Apex Court was pleased to dispose of the said proceedings being Civil Appeal No.849 of 1988 by order dated March 8, 1988 in the following terms.

> ". Special leave granted. Heard counsel for the parties. Though the appeal is

against an interlocutory order, in the facts and circumstances of the case we think it proper to entertain the matter and dispose it on merit.

. The appointment of Receiver is affirmed. The directions indicated by the Division Bench so far as the functioning of the Receiver are also upheld.

. It appears that on the representation of the respondent, the tender offered by the firm to the Maharashtra State Electricity Board has been cancelled. We have also been shown an affidavit in which the tender of the firm has not been entertained by BHEL. The firm is a on-going one and the Receiver represents it. In case any contract is handled by the firm it would be to the benefit of all the parties. We, therefore, suggest to the Receiver to get in touch with the Maharashtra Electricity Board and BHEL for revival of the tenders. We hope and trust that with the clarification which we now make it will be possible to revive the offers for consideration.

. We clarify that all the parties including the respondent continue as partners of the firm and they are entitled to sharing the profits of the firm run by the receiver.

. Any observation made by the Division Bench regarding the meaning to be given to any provision of law will not be binding on the trial Judge for the disposal of the suit. Appeal is disposed of.

. We are thankful that the parties have accepted our suggestion that the whole dispute may be referred to arbitration of Mr.Y.V.Chandrachud, retired Chief Justice of this court. Reference may be made to him of all the disputes by the Trial Court. Parties agree to file the terms of reference to the Arbitrator before the Trial Court within two weeks."

Pursuant to the order of the Apex Court, arbitration

proceeding commenced. Arbitrator framed following issues for consideration, which read thus :

ISSUE NO.1 : Is the partnership called M/s.Babubhai Narottamdas & Co., constituted under the Deed of Partnership dated 5th April, 1980, a partnership "At Will", under which any partner can ask for dissolution of the firm or is the right of the partner of that partnership, who does not desire to continue as a partner any longer, limited only to his or her retirement from the partnership ?

ISSUE NO.2 : If the answer to Issue No.1 is in the negative, that is to say, if the partnership dated 5th April, 1980 is not a partnership "at will", is the Claimant entitled to ask for dissolution of the firm on the grounds mentioned in sub-paragraphs 1 to 9 of paragraph 14 of the Statement of Claim ?

ISSUE NO.3 : Is it open to the Respondents to treat the Notice dated 8th October, 1984 given by the claimant to the Respondents for dissolution of the firm as, a Notice of Retirement from the firm, in the event that he is not entitled to ask for dissolution of the firm ?

ISSUE NO.4 : If the Claimant is entitled to ask for dissolution of the firm either because the partnership is a partnership "at will" or for any of the reasons mentioned in sub-paragraphs 1 to 9 of paragraph 14 of the statement of claim, which are the properties of the partnership in which the Claimant would be entitled to a share ?

ISSUE NO.5 : What is the share of the Claimant in the proper ties which are proved as of the partnership ?

ISSUE NO.6 : Is the claimant entitled to interest on the amount, if any, found due to her after taking accounts of the dissolved partnership ?

ISSUE NO.7 : Are Respondents carrying on or have they carried on, to the exclusion of the claimant, business in the name of the firm of M/s.Babubhai Narottamdas & Co., with the help of the assets and properties belonging to the said firm of which the Claimant had sought dissolution ?

3. The Arbitrator by his award dated 27th March, 2001 has answered each of these issues. It is not necessary to burden this order with the reasons recorded by the Arbitrator or the conclusion reached with regard to the respective issues. Suffice it to observe that Arbitrator has positively found that the partnership was a partnership "at will". On that finding, issue Nos. 2 and 3 have been answered accordingly. While dealing with the issue No.2 and 3, arbitrator has observed that those issues will not survive having found that the partnership being partnership "at will". The matter is now pending before the receiver for taking accounts. During the pendency of the said proceedings, the receiver, acting upon the order passed by the Arbitrator, has proceeded to dispose of the property known as Sea-gull. Sale proceeds have been disbursed in proportion to the concerned parties. Defendants No.2 and 3 however, have not withdrawn the amount which has been offered to them towards their claim. As the question regarding valuation of Goregaon property arose before the receiver and certain objections were raised, receiver has granted liberty to the parties to approach this court. In this backdrop, present chamber summons is taken out for the following

reliefs:

(a) that this Hon’ble Court may be pleased to direct the Learned Court Receiver that before the distribution of the sale proceeds amongst partners of the partnership firm, the accounts of the partnership firm should be first settled and the liabilities of each of the partners should be determined and paid of and only then the sale proceeds should be distributed amongst the parties herein;

(b) that this Hon’ble Court may be pleased to direct the Learned Court Receiver that before the distribution of the sale proceeds amongst partners of the partnership firm, the Capital Gains Tax payable on the sale proceeds of the Seagull Apartment should be deducted from the sale proceeds;

(c) that this Hon’ble Court may be pleased to direct the Learned Court Receiver to direct the valuer to value the said Goregaon factory as on the date of dissolution of the partnership firm that is

8th October, 1984;

(d) that this Hon’ble Court may be pleased to value the stock-in-trade, the benefits of pending contracts, the amount lying to the credit of the firm in the bank accounts, fixed deposits, cash-on-hand, benefits regarding import quota rights and licenses and other incidental rights and benefits as of 8th October 1984 and not as of a future date;

(e) that the Learned Court Receiver should be directed by this Hon’ble Court not to pay the Claimant the share in royalty and to recover whatever monies have been paid to her after 31st March, 2001;

(f) that the Learned court Receiver be directed by this Hon’ble Court to recover the Income Tax paid on royalty given to the Plaintiff herein;

(g) that the Learned Court Receiver be directed by this Hon’ble court to recover the amounts of property tax paid by the

Defendants on behalf of the Plaintiff herein;

(h) that pending the hearing and final disposal of this Chamber Summons the proceedings before the Learned Court Receiver be stayed;

(i) that the costs of this Chamber Summons be provided for.

(j) Any other order or relief as this Hon’ble Court deems fit and proper be granted."

4. After hearing the counsel appearing for parties, in so far as prayer clause (a) is concerned, counsel for the parties fairly accept that it would be appropriate if the accounts of partnership firm are first settled and liability of each of the partners determined before making any payment out of the sale proceeds of the other properties of the firm. In that sense, this relief will have to be granted. Receiver shall ensure that the partnership accounts are settled and liability determined as expeditiously as possible, preferably within six months from today.

5. In so far as prayer clause (b) is concerned, it is seen that after property known as Sea-gull Apartment is disposed of, entire sale proceed has been disbursed between the parties without providing for deductions towards Capital Gain Tax. This position is not in dispute. As the amount is already disbursed and availed by the plaintiff and heirs of original defendant No.1, instead of requiring the said parties to bring back their requisite amount towards Capital Gain tax, in my opinion, such order can be passed by the receiver at the appropriate stage of the proceedings after accounts of partnership firm are settled and liability of respective parties are determined thereby calling upon the parties to deposit proportinate amount.

6. In so far as prayer clause (c) is concerned, which is in relation to the Goregaon factory, controversy is whether the said property should be valued as on 8th October, 1984 or 27th March, 2001, which is the date of the award or the prevailing market price thereof. Ordinarily, in the matter of accounting, the date of dissolution of partnership firm ought to be the relevant date, which in this case is 8th October, 1984; the date on which notice

of dissolution was sent by the plaintiff, which was duly communicated to the other parties. In the present case, the Arbitrator has provided for the course to be adopted for disbursal of the said sale proceeds of the respective property. In paragraph 39 of the award, in so far as Goregaon Factory, the arbitrator has provided that the same shall be valued as a going concern, including the goodwill of the firm, the land on which factory stands, plants and equipments of the factory, and the fixtures appurtenant thereto. In so far as other properties are concerned, specific date has been referred to in the award. The expression "going concern" would obviously mean that the factory will have to be valued on the basis of the prevailing market price, only then the arrangement provided for in the award would become meaningful. This is so because the Arbitrator in paragraph 43 of the award has made it abundantly clear that no interest was being awarded to the claimant on the amount due to her. In view of the arrangement with regard to the disbursal of the sale proceeds of the different partnership properties provided for in the Award, one of the questions raised before me was whether the date of dissolution of partnership firm should be reckoned as 8th October, 1984 or 27th March, 2001, which is the date

of the award. Even this aspect will have to be straightway answered by holding that partnership firm stood dissolved on 8th October, 1984, which was the date, on which dissolution notice was sent by the plaintiff and duly communicated to the other partners. This is so because, Arbitrator has positively found as of fact that partnership in question is partnership at will. This fact can be discerned from paragraph 20.7 if the award. If it is partnership at will, for the reasons recorded by the arbitrator, it necessarily follows that partners were entitled to dissolve the partnership firm by giving dissolution notice. It is not in dispute that plaintiff gave such notice on 8th October, 1984. The defendants however, contested the authority of the plaintiff to dissolve the firm. That issue has now been answered by virtue of the award passed by the Arbitrator. As it is partnership at will, by operation of law, namely, section 43 of the Partnership Act, it will have to be assumed that the partnership firm stood dissolved on 8th October, 1984.

7. Counsel for the plaintiff and heirs of original defendant No.1 however, contends that the date of dissolution be reckoned as 27th March, 2001.

This is so because award refers to that date, while dealing with the manner in which properties being Narottam Niwas and stock entry etc. were to be dealt with. It is not possible to accept this submission. The Arbitrator has provided specific dates in regard to the some of the properties of the firm for the purpose of valuation and disbursal and for adjustment of shares therein of the respective parties. However, where no such specific date has been provided, court receiver will have to proceed on the basis that the relevant date either for the purpose of valuation and other matters will be the date on which partnership has been dissolved i.e. on 8th October, 1984. This is because it is partnership at will. By operation of law, it stood dissolved on 8th October, 1984. The dates referred to by the Arbitrator, in my opinion, are in the context of adjustment to be made between the parties towards the claims and benefits arising from the partnership firm, which stood dissolved on 8th October, 1984. The question that requires to be considered for the present with reference to prayer clause (c) is whether the valuation of Goregaon factory will have to be taken as on 8th October, 1984. Although, I have taken the view that partnership stood dissolved on 8th October, 1984, however, in the present case,

Goregaon factory will have to be valued as a going concern by virtue of the conclusion and directions issued by the Arbitrator in paragraph -39 of the award. This is so because the award has become final, as no party has challenged that award. In other words, said Goregaon factory will have to be valued on the basis of prevailing market price being a going concern.

8. In so far as leave in terms of prayer clause (d) is concerned, same will have to be answered in the context of opinion expressed by the Arbitrator in paragraph-40 of the award. In paragraph-40, it is provided that claimant will be entitled to her 24.25% share in the stock-in-trade, the benefits of pending contracts, the amount lying to the credit of the firm in bank, amount of fixed deposits, cash in hand, benefits regarding import quota rights and licences and other incidental rights as on 31st March, 2001. That directions given by the Arbitrator will bind the parties to the proceedings. Viewed in this perspective, it will have to be held that benefits and inspection of properties referred to in prayer clause (d) will have to be reckoned as on 31st March, 2001.

9. In so far as prayer clause (e) is concerned, it is seen from the record that the claimant has not withdrawn any amount since 16th June, 2000 aggregating sum of Rs.13,49,882/-. The Arbitrator has considered this aspect of the matter in paragraph 37.1 of the award. Claimant has not withdrawn any amount after 31st March, 2001. In so far as relief (e) is concerned, counsel for the plaintiff submits that the total amount withdrawn by the plaintiff being net amount after deduction of taxes, costs charges of the court receiver is in the sum of Rs. 15,74,167.52. The receiver is directed not to credit any further amount to the claimants till the share in royalty is fixed. once that is done, adjustment will have to be provided for while settling accounts of partnership firm and for determining liability and benefits of the respective partners. In that case, there is no necessity of requirisng the claimant to bring back the amount paid to her after 31st March, 2001 as prayed.

10. In so far as the prayer clause (f) is concerned, there is no reason to issue directions to court receiver to call upon the plaintiff to deposit income tax paid on royalty. This is so because award makes clear reference to the fact that amounts

received by the plaintiff are net amount after deduction of tax, costs, charges and expenses of the court receiver. In the circumstances, no direction in this behalf is necessary. Court receiver will however, consider whether any amount is payable by the plaintiff towards income tax or other taxes and outgoings charges. If such conclusion is reached, necessary adjustment will be provided while settling the account between the parties.

11. In so far as prayer clause (g) is concerned, as I have taken the view that partnership stood dissolved on 8th October, 1984, the plaintiff will be liable to pay property tax to the extent of property possessed by the plaintiff from 9th October, 1984 till 31st March, 2001. This is so because award provides that the plaintiff will become owner of the second floor premises of Narottam Nivas with effect from 1st April, 2001. Before 1st April, 2001, the plaintiff was only occupying premises on the second floor of the Narrotam Niwas, even after the dissolution of the partnership firm. On 8th October, 1984 as the plaintiff was in possession of the said premises, she will have to bear expenditure pertaining to property tax for the said period after 9th October, 1984 till 31st March, 2001. Court

receiver will undertake necessary computation and issue appropriate directions or call upon the plaintiff to deposit that amount, in the event amount available with the court receiver is found to be inadequate to provide for necessary adjustment of accounts between the parties.

12. Chamber Summons is disposed of in the above terms.